Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**OLD REPUBLIC UNION INSURANCE COMPANY,**

*Petitioner,*

v.

**TILLIS TRUCKING COMPANY, INC., TILLIS LAND & TIMBER CO., WILLIE RAY PRIDE and MALACHI MOSES,**

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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53 pp

## QUESTION PRESENTED

Should the *Younger* abstention doctrine be used to block a non-Alabama resident's federal court challenge to the flagrantly and patently unconstitutional Alabama wrongful death statute, which allows punitive damages for even minimally negligent conduct but has been repeatedly upheld by the Alabama Supreme Court?

## LIST OF PARTIES PURSUANT TO SUPREME COURT RULE 29.6

The parent company of Old Republic Union Insurance Company is Old Republic General Insurance Group, Inc. Old Republic General Insurance Group, Inc. is itself a wholly owned subsidiary of Old Republic International Corp.

Old Republic Union Insurance Company has no non-wholly owned subsidiaries.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Old Republic Union Insurance Company ("Old Republic"), respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Old Republic seeks reversal of the decision of the Court of Appeals that affirmed the order of the United States District Court for the Middle District of Alabama dismissing Old Republic's complaint for declaratory judgment.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming dismissal of Old Republic's complaint is set forth in the Appendix, at App. 1, and is reported as *Old Republic Union Insurance Company v. Tillis Trucking Co., Inc.*, 124 F.3d 1258 (11th Cir. 1997). The Court of Appeals' order denying Old Republic's suggestion of rehearing *en banc* is set forth in the Appendix, at App. 27.

The unpublished opinion of the United States District Court for the Middle District of Alabama dismissing Old Republic's complaint is set forth in the Appendix, at App. 15.

## JURISDICTION

The court of appeals affirmed dismissal of Old Republic's complaint on October 14, 1997 (App. 1) and denied Old Republic's suggestion of rehearing *en banc* on December 8, 1997. (App. 27). The Eleventh Circuit treats a suggestion of rehearing *en banc* as a petition for rehearing. *See* Eleventh Circuit R. 35-6, 35-7.

Old Republic invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988).

## CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

United States Constitution

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTE INVOLVED IN THIS CASE

Alabama Code § 6-5-410—Wrongful death.

> (a) A personal representative may commence an action and recover such damage as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate.

## STATEMENT OF THE CASE

### BASIS FOR FEDERAL JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(a) because the parties are of diverse citizenship and the amount in controversy ($7 million) exceeds the jurisdictional amount. Plaintiff Old Republic is an Illinois corporation with its principal place of business in Chicago, Illinois. Defendants Tillis Trucking Co. ("Tillis Trucking") and Tillis Land & Timber, Inc. ("Tillis Land") are both Alabama corporations with their principal places of business in Alabama. Defendants Willie Ray Pride and Malachi Moses are likewise citizens and residents of Alabama.

The district court's jurisdiction was also based on 28 U.S.C. §§ 2201 and 2202 because Old Republic sought a declaration of its obligations under two insurance contracts.

## STATEMENT OF FACTS

### Old Republic's Insureds Are Sued Under Alabama's Wrongful Death Statute.

In December 1994, Malachi Moses's wife was killed when her vehicle collided with a log trailer near Ozark, Ala. (V1, R1, p. 3.) Moses filed a wrongful death action against: the driver of the trailer, Willie Ray Pride; Pride's employer Tillis Trucking (under *respondeat superior*); and Tillis Land (alleging it was negligent in building its logging road where it did).

The Alabama wrongful death statute provides:

> § 6-5-410 Wrongful death.
>
> (a) A personal representative may commence an action and recover such damage as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.
>
> (b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.
>
> (c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

> (d) Such action must be commenced within two years from and after the death of the testator or intestate.

Though the statute makes no reference to punitive damages, the Alabama courts have long interpreted it as permitting an award of *only* punitive damages. *See Alabama Great S. R.R. v. Burgess*, 22 So. 913, 915 (Ala. 1897); *Tatum v. Schering Corp.*, 523 So. 2d 1042, 1044 (Ala. 1988). The jury is not allowed to award compensatory damages or even to consider the issue of compensation—instead, it is specifically instructed "*not* to consider the pecuniary or monetary value of the life of the decedent" and that the damages are "*not* recoverable to compensate the family of the deceased from a pecuniary or monetary standpoint." (V2, R28, Tab E, Ex. 1, p. 18.)

**The Insurance Policies Involved.**

At the time of the accident, the Tillis defendants owned two insurance policies issued by Old Republic, each in the amount of $1 million. One was an automobile liability policy; the other a commercial general liability policy. (V1, R1, pp. 4-5.) Old Republic provided all defendants with a defense under the automobile liability but denied coverage under the general liability policy on the ground that it excluded coverage "for bodily injury arising out of the ownership, maintenance, use of any 'auto' owned or operated by any insured," including tractor-trailer combinations. (V1, R1, p. 5.)

**Trial Court Denies Old Republic's Motion To Intervene.**

Shortly before the wrongful death trial was to begin, Old Republic sought leave to intervene in order to sub-

mit special interrogatories to the jury. The proffered interrogatories would have clarified the basis for any reward returned, *i.e.*, whether it was based on operation and maintenance of the logging truck (outside the general liability coverage) or on the placement of the logging road and/or failure to provide a flagman (within the general liability coverage). (V1, R13, Tab B.) The state court initially granted Old Republic's motion to intervene, but then reversed its ruling shortly before trial because of objections by both Moses's counsel and independent counsel for the insureds. (V1, R13, p.6.)

**Jury Returns $7 Million Punitive Damages Verdict Against Pride and Tillis Trucking; Trial Court Holds It Has No "Prerogative" To Entertain A Challenge To The Constitutionality Of Alabama's Wrongful Death Statute.**

The case came on for trial and on September 17, 1996, a jury returned a $7 million punitive damage verdict against Pride and Tillis Trucking. The jury found Tillis Land not liable. In post-trial motions, the defendants sought reversal of the punitive damages award, urging that the Alabama wrongful death statute was unconstitutional. However, the trial court refused even to consider any constitutional challenge to the wrongful death statute, reasoning that it had no "prerogative" to do so because the Alabama Supreme Court had historically ruled that the statute is constitutional. (V2, R24, p. 4.)

Defendants also sought a remittitur based on the fact that Pride had virtually no assets and Tillis Trucking had assets of only $82,000. (V2, R24, p. 2.) After a "*Hammond/Green Oil*" hearing—the post-trial hearing at which Alabama courts review the amount of a punitive

damages award (*Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989))—the trial court denied this relief, accepting Moses's argument that the judgment debtors had one asset worth at least $7 million—a purported "bad faith" insurance claim against Old Republic. (V2, R24, p. 2.)

**Old Republic Files This Declaratory Judgment Action In Federal District Court.**

Old Republic accordingly filed this declaratory judgment action on September 20, 1996, seeking an adjudication of its rights and obligations and a declaration that the Alabama wrongful death statute, as interpreted by the Alabama courts to be purely punitive in nature, violates both the United States and the Alabama Constitutions for each of the following reasons:

- it lacks adequate guidance, standards and procedures for determining the amount of punitive damages necessary for the purpose of deterring and punishing a defendant's wrongful conduct;
- it deprives defendants of personal property rights without due process of law;
- it violates provisions against self-incrimination; and
- it allows the imposition of excessive fines.

(V1, R1, pp. 11-12.)

Alternatively, Old Republic asked the court to declare that its financial responsibility for the $7 million judgment was limited to the $1 million coverage provided by its automobile liability policy.

**Moses And Tillis Defendants Respond With A State Court "Bad Faith" Insurance Suit And A Motion To Dismiss This Action.**

Almost a month later, in response to Old Republic's federal declaratory judgment action, Moses filed a civil action in the Alabama state court *before the same judge who presided over the wrongful death trial.* (V2, R28, Tab C.) Moses asked the trial court to apply the combined $2 million proceeds of Old Republic's automobile and general liability policies in partial satisfaction of the $7 million punitive damages award. (*Id.*) Tillis Trucking filed a cross-claim against Old Republic, asserting that Old Republic was guilty of "bad faith" in failing to settle the Moses claim and should therefore be held liable to pay the entire $7 million punitive damage award, plus additional punitive damages. (V2, R28, Tab D.)

Moses and Tillis Trucking then used this later-filed suit as a basis for moving to dismiss the federal declaratory judgment action on the ground that Old Republic's claims could be raised in defense of the Moses collection suit and Tillis Trucking's "bad faith" action. (V1, R6, p. 8.)

Old Republic opposed that motion on the ground that Old Republic would not be given an opportunity to litigate its claim in the state court action, given that—

- punitive damage awards under the Alabama wrongful death statute plainly violate all constitutional parameters set forth by this Court, yet the Alabama courts have repeatedly upheld the statute against constitutional challenges;
- the state court judge who would hear Moses's collection action and Tillis Trucking's "bad

faith" claim against Old Republic was the very same judge who had already refused to entertain arguments on the constitutionality of the wrongful death statute;

- this Court had recently and emphatically indicated that Alabama courts have yet to fashion appropriate due process constraints on punitive damages awards in civil fraud cases, and the Alabama wrongful death statute suffers the same and many more infirmities; and
- statistical studies and anecdotal evidence demonstrate that the Alabama court system has routinely supported enormous punitive verdicts against nonresident defendants, particularly nonresident insurance companies like Old Republic, by significant multiples in excess of amounts upheld against resident defendants.

**District Court Dismisses Complaint Without Prejudice.**

The district court nonetheless granted the defendants' motion to dismiss, relying on this Court's holdings in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), and *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), that in the exercise of its discretion, a federal court may decline to entertain a suit under the Declaratory Judgment Act where the questions in issue can be "better settled" in a state court proceeding. (V2, R27, p. 4.) The district court ruled that dismissal was also required under the *Rooker-Feldman* doctrine (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923), and

*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983)) even though Old Republic was not a party to the state court judgment on which the district court relied in rendering its ruling. (V2, R27, pp. 10-12.)

### Court of Appeals Affirms Based On *Younger v. Harris*.

The United States Court of Appeals for the Eleventh Circuit affirmed based on the abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971), and *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). The court of appeals held that:

- Moses's later-filed state suit constitutes an "ongoing state judicial proceeding" for *Younger* purposes (App. 7);
- the proceedings implicate important state interests (App. 11); and
- Old Republic had an "adequate opportunity in the state proceedings to raise constitutional challenges" (App. 7).

The court of appeals noted that this Court has never held that "the practical obstacle created by adverse state supreme court precedent deprives a person of an inadequate opportunity to raise the issue within the meaning of *Middlesex*" and that Old Republic did not demonstrate that "state procedural law barred presentation of [its constitutional] claims" in the Alabama state courts. (App. 8.)

## REASONS FOR GRANTING THE WRIT

### I.

### THE *YOUNGER* ABSTENTION DOCTRINE SHOULD NOT BE USED TO BLOCK A NON-ALABAMA RESIDENT'S FEDERAL COURT CHALLENGE TO THE FLAGRANTLY AND PATENTLY UNCONSTITUTIONAL ALABAMA WRONGFUL DEATH STATUTE WHERE THERE IS NO STATE COURT FORUM WHERE THE FEDERAL PLAINTIFF'S CONSTITUTIONAL CLAIMS CAN BE FAIRLY AND FULLY CONSIDERED AND RESOLVED.

This Court explained in *Younger v. Harris*, 401 U.S. 37 (1971), that the abstention doctrine is rooted in principles of comity—

> that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

*Id.* at 44.

Nevertheless, in *Younger* and in other abstention cases, the Court has explained that the abstention rule is subject to exceptions for "extraordinary" or "unusual" circumstances, *id.* at 53, such as where a statute is

> flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

*Id.* at 53-54 (citation omitted).

Further, as this Court made clear in *Steffel v. Thompson*, 415 U.S. 452 (1974), the abstention doctrine presupposes that the pending state court proceeding will "provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights" and that the state courts will carry out their "solemn responsibility, equally with the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States'." *Id.* at 460-61 (citation omitted).

As set forth below, application of these principles to the case at bar mandates the conclusion that the district court abused its discretion in applying the abstention doctrine in this case.

### A. The Imposition Of Punitive Damages Under The Alabama Wrongful Death Statute Is Patently And Flagrantly Unconstitutional.

Even a cursory analysis demonstrates the patent unconstitutionality of punitive damage awards under the Alabama wrongful death statute. In *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), this Court reversed a punitive damages award entered under an Alabama fraud statute as unconstitutionally excessive under three constitutional "guideposts," each of which manifests the patent and flagrant unconstitutionality of the Alabama wrongful death statute—

#### 1) Degree of reprehensibility.

In *Gore*, the punitive damages award was reversed because the defendant's conduct did "not establish the *high degree of culpability* that warrants a substantial

punitive damages award" and "exhibit[ed] none of the circumstances ordinarily associated with *egregiously improper conduct*." 116 S. Ct. at 1601 (emphasis added). In *Gore*, the excessive award had at least been rendered under a statute that expressly required a showing of "oppression, fraud, wantonness, or malice." (Ala. Code §§ 6-5-20, 6-5-21.)

In contrast, punitive damage awards under the Alabama wrongful death statute require no such reprehensible, egregious, reckless, or other wilful and wanton conduct. Rather, a multimillion dollar punitive damage award may be levied against a defendant on the barest showing of only minimally negligent conduct. (Ala. Code § 6-5-410(a).)

The Court in *Gore* noted that the reprehensibility of the conduct is the "most important indicium of the reasonableness of a punitive damage award." *Id.* at 1599. If the punitive award in *Gore* failed this aspect of the constitutionality test, the award in this case obviously does so as well.

**2) Ratio of the punitive damage award to the plaintiff's actual harm and compensatory damages.**

The Alabama wrongful death statute fails this second important constitutional requirement as well. "The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *Id.* at 1601. While the Court in *Gore* declined to draw a bright line between a permissible and impermissible ratio, it did observe that the ratio of the puni-

tive award to the compensatory award in that case was "a breathtaking 500 to 1." *Id.* at 1603.

The Alabama wrongful death statute absolutely prohibits the imposition of any compensatory damages. Thus, under the Alabama wrongful death statute, there is no ratio or other comparison, limitation, or guideline to test the reasonableness of any punitive damage award. There is only the statute itself, which permits an unlimited punitive damage award. Thus, a punitive damages award under the Alabama wrongful death statute cannot pass muster under this second constitutional "guidepost."

**3) Sanctions for comparable conduct.**

The Alabama wrongful death statute also fails this third constitutional "guidepost" set forth in *Gore*. This factor mandates a comparison to civil and criminal punishment for comparable conduct in other contexts. *See id.* at 1603. The Court in *Gore* held that the economic sanction imposed on BMW was "substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance." *Id.*

Under this constitutional prong too the Alabama wrongful death statute is blatantly unconstitutional. Again, the statute allows imposition of punitive damages for even minimally negligent conduct. In this regard, the statute has no comparison anywhere—no other state allows a punitive damage award on proof of barely negligent conduct.

The above three "guideposts" are necessary to a valid punitive damage award because, as the Court stated in

*Gore*, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 1598. As the three-factor analysis above makes clear, no such notice is forthcoming from the Alabama wrongful death statute. A defendant familiar with the laws of the other states of the Union would not have fair notice that violation of the Alabama wrongful death statute's provisions might subject him to a multimillion dollar penalty—there's no statute like it anywhere in this respect. No more "fair notice" is to be gained by reading the statute, either. Its text yields no clue of the potential punishment that lies in store for anyone who should violate it. It does not even mention punitive damages! Thus, as it has been interpreted by the Alabama courts for more than a century, the statute's unconstitutionality truly is "patent" and "flagrant." *See Younger*, 401 U.S. at 53-54.

### B. Alabama State Courts Repeatedly Refuse To Entertain Constitutional Challenges To The Wrongful Death Statute.

Despite the above constitutional infirmities, punitive damage awards under the Alabama wrongful death statute are an entrenched part of the fabric of Alabama law. The Alabama Supreme Court has since at least 1918 rejected challenges to the statute's constitutionality, upholding its validity as recently as 1991. *See Alabama Power Co. v. Turner*, 575 So. 2d 551 (Ala.), *cert. denied*, 500 U.S. 953 (1991); *Central Ala. Elec. Co-op v. Tapley*, 546 So. 2d 371 (Ala. 1989); *Su-*

*preme Lodge of the World v. Gustin*, 80 So. 84, 88 (Ala. 1918).[1]

Taking their cue from the state supreme court, Alabama's lower courts will no longer even seriously entertain a constitutional challenge to the wrongful death statute. In this very case, the Alabama state trial court judge—who will hear this case if the district court's dismissal order is affirmed—has already stated on the record that he cannot offer any relief because "[i]t is not the prerogative of the trial court to reverse or overrule decisions of the Alabama Supreme Court." (V2, R24, p.4.)

When a state court for which the federal court abstains from deciding constitutional issues has no "prerogative" to consider those issues, then the state court proceedings do not "provide a federal plaintiff with the necessary vehicle for vindicating his constitutional rights," *Steffel, supra*, 415 U.S. at 460, and the reason and purpose for the *Younger* abstention doctrine no longer exist. There simply has been no "adequate opportunity in the state proceedings to raise [Old Republic's] constitutional chal-

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[1] The court of appeals, in affirming dismissal of this case on *Younger* grounds, took heart in the fact that Alabama courts have, in light of *Gore*, ordered remittiturs in six recent punitive damages cases, ushering in what the court called "a new era for punitive damages in Alabama." 124 F.3d at 1264. However, none of these six "new era" cases involved the wrongful death statute at issue and indeed the Alabama Supreme Court stated in *Life Insurance Co. of Ga. v. Johnson*, 684 So. 2d 685 (Ala. 1996), that the additional standards it was setting forth in that case to give juries more guidance on punitive damages *do not apply to actions based on wrongful death*. *Id.* at 696. (Significantly, this Court vacated *Johnson* and remanded to the Alabama Supreme Court for reconsideration in light of *Gore*. *See* 117 S. Ct. 288 (1996)).

lenges." *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 124 F.3d 1258, 1261 (11th Cir. 1997), quoting *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).[2]

No principle of comity should require Old Republic to go through the meaningless ritual of presenting its constitutional challenges to a tribunal that has already admitted it has no "prerogative" to hear them. Nor should any principle of comity require Old Republic to then appeal to the Alabama Supreme Court—a tribunal that countless times has upheld the constitutionality of the same statute.

A prominent constitutional scholar has written:

> What is the common message of *Stone v. Powell* and *Younger v. Harris* and *Allen v. McCurry*? It is that the state court will be allowed to adjudicate, and do so dispositively, if—but only if—there was or will be a "full and fair opportunity" to litigate the constitutional question in state court. *Per contra*, if it is shown that the state forum was or will be inhospitable, if corrective process is unavailable in the state court system, then the federal court will step in to adjudicate the federal claim.

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[2] Nor does a *Hammond/Green Oil* hearing—the post-trial hearing at which Alabama courts review the amount of a punitive damage award—afford meaningful review. Justice Breyer reviewed the *Hammond/Green Oil* factors in detail in his concurring opinion in *Gore* and concluded that they amount to nothing more than a "rubber stamp" of the jury award: "[A]s the Alabama courts have authoritatively interpreted [the *Hammond/Green Oil* factors], they impose little actual constraint." *Gore*, 116 S. Ct. at 1606 (Breyer, J., concurring).

Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 626 (1981). Here eighty years of Alabama jurisprudence is "inhospitable" to Old Republic's constitutional challenge to the Alabama wrongful death statute. Accordingly, only the federal court can adjudicate the constitutional issues. It should "step in" and do so.

## CONCLUSION

Wherefore, for the foregoing reasons, petitioner Old Republic Union Insurance Company respectfully prays that its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted and that the Eleventh Circuit be ordered to reverse the district court's dismissal order and to order Old Republic's complaint for declaratory judgment reinstated and adjudicated on its merits.

Respectfully submitted,

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# APPENDIX

App. 1

United States Court of Appeals,

Eleventh Circuit.

No. 97-6179

Non-Argument Calendar.

OLD REPUBLIC UNION INSURANCE COMPANY,
Plaintiff-Appellant,

v.

TILLIS TRUCKING CO., INC.; TILLIS LAND & TIMBER CO.; WILLIE RAY PRIDE; MALACHI MOSES,
Defendants-Appellees.

Oct. 14, 1997.

Appeal from the United States District Court for the Middle District of Alabama. (No. CV-96-T-1462-S), Myron H. Thompson, Judge.

Before TJOFLAT, COX and CARNES, Circuit Judges.

CARNES, Circuit Judge:

This case arises from the efforts of Old Republic Union Insurance Company ("Old Republic") to avoid payment of a state court judgment against its insured and, alternatively, to have its obligations under certain insurance policies determined by a federal court instead of state court. Old Republic sought to do that by instituting a declaratory judgment action in federal district court. Relying on principles of federalism and comity, including those embodied in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, the

district court dismissed the lawsuit without prejudice, in favor of pending state court proceedings. We affirm.

## I. BACKGROUND

On December 14, 1994, a tragic accident occurred between a Tillis Trucking Company tractor-trailer driven by Willie Ray Pride and an automobile driven by Cynthia Moses, who died as a result of the accident. Together with the co-administrators of the estate, Mrs. Moses' husband, Malachi Moses, brought a wrongful death action in Dale County, Alabama, against Pride, Tillis Trucking Company, and its related company, Tillis Land & Timber (collectively, the "Tillis Companies").

Old Republic insures the Tillis Companies under both a commercial automobile liability policy and a general liability policy. Accordingly, Old Republic provided a defense to all the defendants in the wrongful death action, while maintaining that it was potentially responsible for a judgment only up to the $1,000,000 policy limit of the commercial automobile policy. Moses and independent counsel for the Tillis Companies contended that Old Republic would also be liable under the terms of the general liability policy for any judgment in excess of that policy limit.

At trial, Old Republic moved to intervene in order to submit interrogatories to the jury for the purpose of establishing whether liability was based on any theory that would implicate the general liability policy in addition to the commercial automobile policy. Initially, the state court granted Old Republic's motion for intervention, but it later reversed that ruling. Accordingly, Old

Republic's proposed interrogatories were not submitted to the jury. On September 17, 1996, the jury returned a verdict against Pride and Tillis Trucking, awarding Moses $7,000,000 in punitive damages.[1]

Three days later, on September 20, 1996, Old Republic filed a declaratory judgment action in federal district court, seeking the following declarations: (1) the Alabama Wrongful Death Statute, Ala.Code § 6-5-410, is unconstitutional; (2) the Alabama Wrongful Death Statute, if constitutional, cannot be constitutionally enforced against Old Republic or any other insurer; (3) Old Republic's liability to the defendants cannot exceed the $1,000,000 policy limit of its commercial automobile insurance policy with the insured.

On October 18, 1996, Moses and the co-administrators filed a second state lawsuit against Old Republic, Tillis Trucking, and Pride. That lawsuit requested the state court to: (1) enter an order requiring Old Republic to pay the limit of the commercial automobile policy to the plaintiffs, and (2) conduct a jury trial to determine the existence and application of coverage under the general liability policy. Tillis Trucking answered and filed a cross-claim against Old Republic, seeking compensatory and punitive damages for Old Republic's failure to settle the prior wrongful death action.

On February 5, 1997, the district court dismissed Old Republic's declaratory judgment action without prejudice

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[1] As authoritatively construed by the Alabama Supreme Court, the Alabama Wrongful Death Statute provides only for the award of punitive damages. *See, e.g., Tatum v. Schering Corp.*, 523 So.2d 1042 (Ala.1988).

in favor of the pending second state action. Relying on principles of federalism and comity, including those embodied in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, the district held that exercise of jurisdiction over the declaratory judgment action would be "contrary to the established doctrines which discourage such interference with state courts." District Court Op. at 12-13. This appeal followed.

## II. STANDARD OF REVIEW

"Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.,* 515 U.S. 277, 284, 115 S.Ct. 2137, 2142, 132 L.Ed.2d 214 (1995). "Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment. . . ." *Id.* at 286, 115 S.Ct. at 2143. Accordingly, the Supreme Court has directed that "district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion," *id.* at 288, 115 S.Ct. at 2144, and we apply that standard here.

## III. ANALYSIS

The district court declined to exercise jurisdiction over Old Republic's declaratory judgment action, relying on

"considerations of practicality and wise judicial administration." District Court Op. at 9 (quoting *Wilton,* 515 U.S. at 286, 115 S.Ct. at 2143). Among those considerations were the abstention principles of *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), particularly as illuminated by the Supreme Court's subsequent decision in *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). As we shall explain, those principles alone are sufficient to prevent the district court's decision from being an abuse of discretion.[2]

As the district court implicitly recognized, a declaration that the Alabama Wrongful Death Statute is unconstitutional would have the effect of enjoining the state court from enforcing the $7,000,000 wrongful death judgment entered against the Tillis Companies and from entertaining the subsequent state action brought by Moses and the co-administrators against Old Republic seeking partial satisfaction of that judgment from the policies of insurance.

Under *Younger v. Harris* and its progeny, federal district courts must refrain from enjoining pending state

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[2] The district court relied upon the *Rooker-Feldman* doctrine as an additional ground for dismissing Old Republic's declaratory judgment action, even though Old Republic ultimately was denied the opportunity to intervene in the state court wrongful death action. Because we hold that the district court did not abuse its discretion in relying on *Younger* abstention principles in dismissing the declaratory judgment action, and because those principles alone warrant affirmance of the district court's judgment, we need not decide whether the *Rooker-Feldman* doctrine has any bearing on this case.

court proceedings except under special circumstances. *See Younger,* 401 U.S. at 53-54, 91 S.Ct. at 755. Under *Samuels v. Mackell,* 401 U.S. 66, 73, 91 S.Ct. 764, 768, 27 L.Ed.2d 688 (1971), the principles of *Younger* apply to declaratory judgments that would effectively enjoin state proceedings. Accordingly, the principles of *Younger* have direct application to this case.[3]

Although *Younger* itself only concerned state criminal proceedings, its principles have been extended to prohibit federal courts from enjoining state court civil proceedings where important state interests are involved:

> The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature. . . . Proceedings necessary for the vindication of important state policies or for

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[3] By contrast, the principles of *Johnson v. American Credit Co. of Georgia,* 581 F.2d 526, 530 (5th Cir.1978), relied upon by Old Republic, are plainly inapplicable to this case. In *Johnson,* we reversed a district court's abstention order in a 42 U.S.C. § 1983 suit challenging the constitutionality of Georgia's attachment scheme, because the district court had erroneously held that the plaintiff was required to exhaust his state remedies before seeking relief in a federal forum. *Id.* at 529. In *Johnson,* no related state action was pending, and thus the principles of *Younger* raised no barrier to the plaintiff's lawsuit. Indeed, our *Johnson* opinion noted explicitly that the defendants did "not assert that the abstention by the district court can be justified under the principles of federalism and comity developed in *Younger* " and held that "*Younger* . . . [does] not apply to this case." *Id.* at 530 n. 8.

> the functioning of the state judicial system also evidence the state's substantial interest in the litigation. Where vital state interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims. . . .
>
> The question in this case is threefold: first, do [the proceedings] constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

*Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed. 2d 116 (1982) (citations and internal quotation marks omitted).

Applying the *Middlesex* factors to this case, it is readily apparent that the first factor is met. Clearly, there is an ongoing state judicial proceeding in this case that effectively would be enjoined if the federal court declared the Alabama Wrongful Death Statute to be unconstitutional: the state court enforcement action brought by Moses and the co-administrators. It is of no moment that the state court action was filed after Old Republic filed its federal declaratory judgment action. The Supreme Court has made it plain that the principles of *Younger* apply with equal force in the context of subsequently filed state court proceedings, so long as those "state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in federal court.'" *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 238, 104 S.Ct. 2321, 2328, 81 L.Ed.2d 186 (1984) (quoting *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 223 (1975)).

Skipping the second factor for the moment, it is also clear that Old Republic has an adequate opportunity to raise in state court any constitutional objections it has to the Alabama Wrongful Death Statute. Certainly, Alabama state procedural law does not "clearly bar the interposition of the constitutional claims." Indeed, the Alabama Supreme Court has already entertained several constitutional challenges to the Wrongful Death Statute. *See, e.g., Alabama Power Co. v. Turner,* 575 So.2d 551 (Ala.1991); *Central Alabama Elec. v. Tapley,* 546 So.2d 371 (Ala.1989). Those particular challenges were rejected, but Alabama law did not bar their interposition.

Old Republic contends that the Alabama Supreme Court's decisions in *Turner* and *Tapley* deprive it of an adequate opportunity to raise its constitutional challenges, because the Alabama Supreme Court has already upheld the statute as constitutional. We disagree. The Supreme Court has never held that the practical obstacle created by adverse state supreme court precedent deprives a party of an adequate opportunity to raise the issue within the meaning of *Middlesex.* To the contrary, the Court has held that "the burden on this point rests on the federal plaintiff to show 'that state *procedural* law barred presentation of [its] claims.'" *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 14, 107 S.Ct. 1519, 1528, 95 L.Ed.2d 1 (1987) (quoting *Moore v. Sims,* 442 U.S. 415, 432, 99 S.Ct. 2371, 2382, 60 L.Ed.2d 994 (1979)) (emphasis added). Old Republic can point to no feature of Alabama procedural law that prohibits it from attempting to persuade the Alabama Supreme Court to reexamine its decisions in *Turner* and *Tapley,* or from pressing constitutional arguments that those cases did not address. Accordingly, we cannot say that the pending state

court enforcement action will not afford Old Republic an adequate opportunity to press its federal constitutional claims.

Our conclusion that Alabama precedent against Old Republic on the merits on one or more of its contentions should not excuse it from pursuing those contentions in state court is supported by analogy to Supreme Court decisions dealing with futility as it relates to procedural default doctrine in habeas corpus cases. Federal habeas law, like abstention law, is infused with notions of federalism and comity. With exceptions and qualifications not relevant here, procedural default doctrine generally bars a state prisoner from raising in a federal habeas proceeding issues which he failed to timely raise in state court, absent a showing of cause and prejudice. In *Smith v. Murray,* 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), the Supreme Court reiterated the holding of an earlier decision, *Engle v. Isaac,* 456 U.S. 107, 130 & n. 36, 102 S.Ct. 1558, 1573 & n. 36, 71 L.Ed.2d 783 (1982), that the likelihood a particular federal constitutional claim will be rejected on the merits in the state courts does not excuse a habeas petitioner's failure to raise it there. In *Smith,* the Court applied that holding to the perceived futility of pressing a claim to the state supreme court, explaining that "it is the very prospect that a state court may decide, upon reflection, that the contention is valid that undergirds the established rule that perceived futility alone cannot constitute cause." *Id.* at 534-35, 106 S.Ct. at 2666 (citations and internal quotation marks omitted). Likewise, the possibility that the Alabama Supreme Court may decide, upon reflection, that Old Republic's contentions are valid, undergirds our conclusion that perceived futility does not mean that Old

Republic lacks an adequate opportunity to raise its contentions in the Alabama Supreme Court.[4]

Returning to the second *Middlesex* factor, the question is this: Does the pending enforcement action against Old Republic—to which the state is not a party—involve a sufficiently "important" state interest to justify invocation of the *Younger* doctrine? The Supreme Court has itself supplied the answer by applying *Younger* abstention in the context of a civil punitive damage award between private parties. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), Pennzoil obtained a judgment in a Texas state court against Texaco for nearly $11 Billion, including punitive damages of $3 Billion. Under Texas law, it appeared that Texaco could prevent enforcement of the judgment only if it posted a bond for more than $13 Billion, which it could not do. Facing that dilemma, Texaco brought a civil action in federal district court claiming that the Texas bond and lien provisions denied it due process. Texaco requested that the district court enjoin enforcement of the judgment pending the appeal of the judgment in the Texas

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[4] Old Republic has not cited, nor has our research revealed, any reported federal appellate decisions holding that the absence-of-adequate-opportunity prong of *Middlesex* is satisfied by unfavorable state supreme court precedent addressing the constitutional issue in question. In *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 490-92 (7th Cir.1984), the Seventh Circuit did speculate that unfavorable state court precedent might suffice in some circumstances, but avoided resolution of the question by deciding the case on alternative grounds. We are unpersuaded by that speculative dicta. At the time of *W.C.M. Window*, the Seventh Circuit did not have the benefit of the Supreme Court's *Pennzoil* or *Smith* opinions.

courts. The district court entered an injunction, and the court of appeals affirmed. *See id.* at 6-8, 107 S.Ct. at 1524.

The Supreme Court reversed, holding that the federal district court should have abstained on *Younger* grounds. *See Pennzoil,* 481 U.S. at 17, 107 S.Ct. at 1529. The Supreme Court reasoned that "the States have important interests in administering certain aspects of their judicial systems" that can suffice to support invocation of *Younger* abstention, even in the context of civil proceedings involving purely private parties. *Id.* at 14, 107 S.Ct. at 1527. The Court elaborated on the importance of the state's interest as follows:

> Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

*Id.*

Under *Pennzoil,* it is readily apparent that pending enforcement action against Old Republic is sufficient to satisfy the second *Middlesex* factor. A federal declaratory judgment that the Alabama Wrongful Death Statute is unconstitutional would not only interfere with partial satisfaction of the wrongful death judgment against the Tillis Companies by means of an enforcement action against Old Republic, it "would do so on grounds that challenge the very process by which [that] judgment[ ] [was] obtained."

As the district court correctly observed, *Younger* abstention is rooted in notions of comity. *See, e.g., Pennzoil,* 481 U.S. at 10-11, 107 S.Ct. at 1525-26. In order to award Old Republic the declaratory relief it seeks, a federal court would have to determine that Alabama's procedures for awarding damages under its wrongful death statute are so woefully inadequate that its own state courts are incapable of preventing unconstitutional damage awards in wrongful death cases. The federal court would have to find that Alabama state courts are incapable of enforcing the federal constitution in this context. Merely stating that proposition is sufficient to illuminate why the *Younger* doctrine stands in the way of the relief sought by Old Republic.

Principles of comity notwithstanding, Old Republic contends that exceptional circumstances in Alabama required the district court to entertain its declaratory judgment action. Specifically, Old Republic contends that it cannot obtain a fair resolution of its constitutional claims in state court due to "the inherent bias of an entire court system which routinely enters and affirms enormous punitive awards against out-of-state defendants and, in particular, out-of-state insurance companies." In constructing that argument, Old Republic makes much of newspaper and magazine articles, which "tell a bleak story of jury excesses," as well the fact that the United States Supreme Court has recently held some Alabama punitive damage judgments to be unconstitutionally excessive. According to Old Republic, the Supreme Court's opinion in *BMW of North America, Inc. v. Gore,* ___ U.S. ___, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), illustrates the constitutional deficiencies of Alabama's system.

We are aware of the Supreme Court's decision in *BMW,* but it did not hold that Alabama's punitive damages laws are unconstitutional; instead, it held that they had been unconstitutionally applied. *See* ___ U.S. at ___ - ___, 116 S.Ct. at 1598-99. There is a world of difference between holding that Alabama courts have erred by failing to reduce or overturn unconstitutionally excessive damage awards in one or more cases and in holding that the entire state punitive damages scheme is *incapable* of constitutional application. Accordingly, *BMW* does not change the *Younger* abstention analysis applicable to this case.

Although on some occasions Alabama's punitive damages laws have been applied unconstitutionally, Old Republic has not shown that the Alabama Wrongful Death Statute is "flagrantly and patently violative of express constitutional prohibitions," or that the Alabama courts are applying the statute in bad faith, or that other "extraordinary circumstances" are present, as would be necessary to make an exception to the *Younger* rule. *See Younger,* 401 U.S. at 53-54, 91 S.Ct. at 755 (citation and internal quotation marks omitted). Since *BMW,* the Alabama Supreme Court has shown itself able and willing to follow the Supreme Court's guidelines for ensuring that Alabama punitive damage awards satisfy constitutional constraints. *See, e.g., American Pioneer Life Ins. Co. v. Williamson,* No. 1921796, ___ So.2d ___, ___ (Ala. Sept. 5, 1997) (on remand from the Supreme Court) (conditioning affirmance on remittitur of $2,000,000 punitive damage award to $750,000); *Ford Motor Co. v. Sperau,* No. 1931591, ___ So.2d ___, ___ (Ala. Sept. 5, 1997) (on remand from the Supreme Court) (conditioning affirmance on remittitur of $6,000,000 punitive damage

award to $1,792,000); *Life Ins. Co. of Georgia v. Johnson,* No. 1940357, ___ So.2d ___, ___ (Ala. Aug. 15, 1997) (on remand from the Supreme Court) (conditioning affirmance on remittitur of $15,000,000 punitive damage award to $3,000,000); *Union Sec. Life Ins. Co. v. Crocker,* No. 1931672, ___ So.2d ___, ___ (Ala. Aug. 15, 1997) (on remand from the Supreme Court) (conditioning affirmance on remittitur of $2,000,000 punitive damage award to $1,000,000); *Hillcrest Ctr., Inc. v. Rone,* No. 1940535, ___ So.2d ___, ___ (Ala. Aug. 1, 1997) (affirming trial court's remittitur of punitive damage award from $200,000 to $130,000); *BMW of North America, Inc. v. Gore,* No. 1920324, ___ So.2d ___, ___ (Ala. May 9, 1997) (on remand from the Supreme Court) (conditioning affirmance on remittitur of $2,000,000 punitive damage award to $50,000); *Foremost Ins. Co. v. Parham,* 693 So.2d 409, 413, 435 (Ala.1997) (conditioning affirmance on remittitur of two separate $7,500,000 punitive damage awards to $175,000 and $173,000). Indications are that the *BMW* decision has ushered in a new era for punitive damages in Alabama.

## IV. CONCLUSION

For the foregoing reasons, we conclude that the district court did not abuse its discretion in dismissing Old Republic's declaratory judgment action. The district court's judgment of dismissal without prejudice is AFFIRMED.

[Filed February 5, 1997]

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, SOUTHERN DIVISION

| | | |
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| OLD REPUBLIC UNION INSURANCE COMPANY, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION No. 96-T-1462-S |
| TILLIS LAND & TIMBER CO., TILLIS TRUCKING CO., INC., WILLIS RAY PRIDE, and MALACHI MOSES, | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

Relying on the Declaratory Judgment Act of 1984, 28 U.S.C.A. § 2201(a), plaintiff Old Republic Union Insurance Company seeks a declaration that its obligation for a $7 million jury verdict against its insureds, defendants Tillis Trucking Co., Inc., and Willie Ray Pride, cannot exceed the $1 million limit of their commercial automobile liability policy, or in the alternative, that the Alabama wrongful death statute violates the United States and the Alabama Constitutions and cannot be enforced. Old Republic has invoked the court's diversity-of-citizenship jurisdiction. 28 U.S.C.A. § 1332. Old Republic is a citizen of Illinois, and defendants are citizens of Alabama. Now before the court are motions filed by Malachi Moses, plaintiff in the underlying action which resulted

in the verdict against Tillis Trucking and Pride, and by Tillis Trucking and Tillis Land & Timber Company to dismiss the declaratory action as to all parties, or to stay it pending the outcome of a second state lawsuit filed by Moses and others. For reasons that follow, the court will grant the motions and dismiss this lawsuit, albeit without prejudice.

I.

The events leading up to this litigation and the pending motions may be summarized as follows:

- There are two state lawsuits which relate to the present matter. The first is the underlying litigation, a wrongful death claim in Dale County, Alabama, which arose from an accident on December 14, 1994 between a Tillis Trucking tractor and trailer, driven by Pride, and an automobile driven by Moses's wife, who died as a result of the accident. Named as defendants in that action were Pride, Tillis Trucking, and its related company, Tillis Land and Timber.

- Old Republic Insurance insures the Tillis companies under both a commercial automobile liability policy and a general liability policy. Old Republic provided a defense to all defendants in the wrongful death action, but with the stated position that it considered itself potentially responsible for a judgment only under the commercial automobile liability policy. Moses and the independent counsel for the Tillis companies contended that Old Republic would be also liable under the terms of the general liability policy for any judgment against

them in excess of $1 million, which is the limit of the commercial automobile policy.[1]

- At trial, Old Republic moved to intervene in order to submit interrogatories to the jury establishing whether liability was based on any theory which would implicate the general liability policy in addition to the commercial automobile policy. The state court first granted Old Republic's motion on August 11, 1996, but reversed that ruling on August 26, 1996. On September 17, 1996, the jury returned a verdict against Pride and Tillis Trucking—but not against Tillis Land & Timber—for $7 million.

- Old Republic filed this declaratory judgment action on September 20, 1996, seeking a declaration that the Alabama wrongful death statute is unconstitutional, or that its obligation for the judgment against Tillis Trucking is limited to $1 million under the commercial automobile liability policy.

- On October 18, 1996, Moses and others filed a second state lawsuit against Old Republic, Tillis Trucking, and Pride. Tillis Trucking responded and filed a cross-claim complaint against Old Republic, alleging that Old Republic acted negligently, in breach of contract, and with bad faith in refusing to settle the claims in the underlying wrongful death action.

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[1] The general liability policy contains an exclusion for motor vehicle accidents, which Moses claimed did not prevent a finding of liability for other activity—failure to warn passing motorists at the plant entrance where the accident occurred, allegedly negligent maintenance of vehicle, and the like—which would implicate the general policy.

II.

A.

More than 50 years ago, in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173 (1942), the Supreme Court addressed circumstances similar to those presented to this court. An insurer, anticipating a coercive suit, sought a declaration in federal court of nonliability on an insurance policy. The district court dismissed the lawsuit in favor of a pending state proceeding, to which the insurer had been added as a defendant. The appellate court reversed, holding that the trial court had abused its discretion, and ordered the trial court to proceed to the merits. The Supreme Court reversed the appellate court and held that, "Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgment Act, it was under no compulsion to exercise that jurisdiction." *Brillhart*, 316 U.S. at 494, 62 S.Ct. at 1175. The Court explained that "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law between the same parties." *Id.* at 495, 62 S.Ct. at 1175-76. The Supreme Court explained that the question for a federal court presented with a suit under the Declaratory Judgment Act is "whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court." *Id.*

In *Wilton v. Seven Falls, Co.*, ___ U.S. ___, 115 S.Ct. 2137 (1995), the Supreme Court reaffirmed *Brillhart*'s holding. The Court rejected the suggestion that interven-

ing decisions, *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976), *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552 (1978), and *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983), had in any way undermined *Brillhart*'s holdings. The *Wilton* Court stated that district courts still "have substantial latitude in deciding whether to stay or to dismiss a declaratory suit in light of pending state proceedings." ___ U.S. at ___, 115 S.Ct. at 2142. *See also United States Fidelity and Guarantee Company v. Algernon-Blair, Inc.*, 705 F. Supp. 1507 (M.D. Ala. 1988) (holding that *Brillhart* was still controlling after *Colorado River*, *Calvert Fire Ins.* and *Moses H. Cone*).

In applying *Brillhart*, the Eleventh Circuit has held that, of the many factors that may legitimately enter into a district court's decision whether to hear a prayer for declaratory relief, the existence of an ongoing state proceeding involving the same issues as the declaratory judgment action is the most potent. *Angora Enterprises, Inc. v. Condominium Ass'n of Lakeside Village, Inc.*, 796 F.2d 384, 387-88 (11th Cir. 1986) (per curium); *Michigan Tech Fund v. Century Nat'l Bank of Broward*, 680 F.2d 736, 742 (11th Cir. 1982) *Ven-Fuel Inc. v. Department of the Treasury*, 673 F.2d 1194, 1195 (11th Cir. 1982); *see also* 6A J. Moore, Moore's Federal Practice ¶ 57.08[3] at 57-44 (1984). "Exercise of federal jurisdiction in such a situation risks unnecessary commitment of scarce judicial resources, multiplicative expenditures of legal services, inconsistent ruling at numerous litigation junctures, and the appearance of disregard for the state trial court's authority and expertise in violation of basic

norms of federal and state comity." *Algernon-Blair*, 705 F. Supp. at 1514.

Of course, Moses's state court litigation does not serve as a per se bar to Old Republic's declaratory judgment action. *See* Fed.R.Civ.P. 57 ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."); 6A J. Moore, Moore's Federal Practice ¶ 57.08[6.-1] at 57-54 (1984). In exercising its discretion in this situation under *Brillhart*, the district court must direct its attention to the adequacy of the state proceeding in resolving the disputes presented in the federal complaint. The Eleventh Circuit has stated that, "In its discretion, a district court may decline to entertain a declaratory judgment action on the merits when a pending proceeding in another court will fully resolve the controversy between the parties." *Ven-Fuel*, 673 F.2d at 1195. And "[t]he district court has discretion to decline to entertain a diversity action seeking a declaratory judgment and raising issues of state law when those same issues are being presented contemporaneously to state courts and thus will necessarily be resolved by the state courts." *Michigan Tech Fund* 680 F.2d at 742 (citations omitted).

The most recent Eleventh Circuit statement on the subject suggests that the relevant determinant is not whether the state court litigation involves the identical issues in form as the federal action, but rather whether the substance of the federally pleaded issues will be resolved in state court.

> "Although Fed.R.Civ.P. 57 specifically provides that the existence of 'another adequate remedy does not preclude a judgment for declaratory

> relief in cases where it is appropriate,' a court, 'in the exercise of the discretion that it always has in determining whether to give a declaratory judgment, may properly refuse declaratory relief if the alternative remedy is better or more effective.' 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d, § 2758 at 621-23 (footnotes omitted). This is also true if there is a pending action in which *some* of the questions posed by the declaratory action *have or may be raised.* As Professors Wright, Miller and Kane have summarized:
>
> > 'Unnecessary interference with state court litigation should be avoided. The Declaratory Judgment Act was not intended to enable a party to obtain a change of tribunal from a state to federal court, and it is not the function of the federal declaratory action merely to anticipate a defense that otherwise would be presented in a state action.'"

*Angora Enterprises*, 796 F.2d at 387-88 (citations omitted) (emphasis added).

The proper inquiry, then, is whether there is adequate opportunity for the issues raised to be fully litigated in the state forum. *Middlesex Count Ethics Comm'n v. Garden State Bar Assoc.*, 457 U.S. 423, 432, 102 S. Ct. 2512, 2521 (1982). The Supreme Court has stated that, where vital state interests are involved, an adequate opportunity is present unless state law bars a plaintiff from raising the federal challenge in the state proceeding. *Id.* Moreover, "[m]inimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights," *Id.* at 431, 2521.

Here, notably, Old Republic has two state proceedings in which it has opportunity to present its federal challenges. First, in the underlying wrongful death action, Old Republic was not barred from presenting these claims to the court. On the contrary, it appears that Old Republic raised the constitutionality of the Alabama Wrongful Death Statue in its answers to the complaints, in the pre-trial order, in its motion for directed verdict at the end of the plaintiff's case, in its post-trial motion for a new trial, judgment not withstanding the verdict, or request for remittitur, and in its motion to stay execution of judgment. Presumably, it may proceed in state courts on appeal of these motions as well as with its denied motion to intervene.

Next, in Moses's second, still pending, state action, Old Republic is charged with fraud and bad faith in its conduct in the underlying wrongful death litigation. The state lawsuit directly implicates Old Republic's contractual obligations to the Tillis companies, obligations which Old Republic disputes in its complaint to this court, and which are central to the resolution of Moses's claims. Old Republic's claims of alleged unconstitutionality of the Alabama wrongful death statute may freely be asserted in that state action. Most significantly, the ultimate question of Old Republic's liability for the verdict against its insureds, now the plaintiffs in the pending state action, will be fully and finally determined by the outcome of that lawsuit, so long as it is allowed to proceed.

In other words, Old Republic has not demonstrated, and, indeed, does not argue, that it was *barred* from raising the precise issues it alleges in either the underlying wrongful death litigation or in the pending state

action brought by Moses. And, in the language of *Ven-Fuel*, the requirement that the "pending proceeding in another court will fully resolve the controversy between the parties" is met. *See Ven-Fuel*, 673 F.2d at 1195.

Therefore, by urging that "this court should *not* use *Wilton* as a shield to avoid hearing this case,"[2] Old Republic asks the court to ignore, if not defy, both the Supreme Court's and the Eleventh Circuit's guidelines for application of discretion and restraint in favor of Old Republic's admitted forum shopping. *See Wilton*, ___ U.S. at ___, 115 S.Ct. at 2143, *Angora Enterprises*, 796 F.2d at 387-88; *see also United Insurance Co. v. Harris*, 939 F. Supp. 1527 (M.D. Ala 1996). This the court will not do. Instead, it applies "considerations of practicality and wise judicial administration" in declining to exercise jurisdiction over this declaratory action. *See Wilton*, 115 S.Ct. at 2143.

B.

This case presents another compelling reason to grant dismissal in addition to its discretionary Declaratory Act jurisdiction, in that Old Republic asks this court, in essence, to review a completed proceeding and jury verdict from a state court while post-trial motions on the issues presented are still pending—a highly irregular request. Moreover, Old Republic argues that the Alabama wrongful death statute applied in the completed judgment cannot be enforced against it or against any of

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[2] Supplemental brief of plaintiff in opposition to motion to dismiss, filed November 21, 1996, at 3.

its insureds, and asks this court to intervene to prevent its enforcement. In effect, Old Republic's complaint places this court in a position of an appeals court for a state trial court's decisions, and demands its review of the final judgment of a state court pursuant to a jury verdict.

Under the *Rooker-Feldman* doctrine, a lower federal court lacks subject-matter jurisdiction to act as a court of appeals for a state court judgment.[3] As is the related *Younger* abstention doctrine,[4] this principle is firmly rooted in the most fundamental elements of our federalist system of justice, those which reflect "the notion of 'comity,' that is a proper respect for state functions," and a belief that "the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 976 (1971) (holding that federal courts should voluntarily abstain from enjoining matters where pending state cases will resolve the underlying disputes).

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[3] The doctrine derives its name from two Supreme Court cases, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 1315 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416, 44 S. Ct. 149, 150 (1923). The lack of jurisdiction under this doctrine may be raised by either party or sua sponte by the court.

[4] Recently, when confronted with a declaratory judgment action framed as a challenge to the constitutionality of the Alabama's punitive damages statute, another court in this district dismissed the action based on the *Younger* abstention doctrine. *See Alfa Financial Corp. v. Key*, 927 F. Supp. 423, 431-432 (M.D. Ala. 1996).

*Rooker-Feldman* has two statutory bases, 28 U.S.C.A. § 1257, which limits federal review of state court proceedings to the United States Supreme Court, and 28 U.S.C.A. § 1331, which provides that federal district courts are courts of original jurisdiction. The broad premises of the doctrine apply not only to claims that were actually raised and adjudicated in the state court, but to any claims which are "inextricably intertwined" with the state court judgment. The Eleventh Circuit Court of Appeals affirmed its support of the scope of the doctrine in recent case of *Powell v. Powell*, 80 F. 3d 464, 466-467 (11th Cir. 1996), finding that the court had no jurisdiction over a challenge to the constitutionality of the Uniform Services Former Spouses Protection Act which was "inextricably intertwined" with a final judgment in a state court divorce action. The court notes one circumstance where a limitation is placed on the *Rooker-Feldman* doctrine: where there is "no reasonable opportunity to raise [the] federal claim in the state proceedings." *Powell*, 80 F.3d at 467 (citing *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir. 1983), *cert. denied*, 467 U.S. 1210, 104 S. Ct. 2398 (1984).

The claims Old Republic asserts are also "inextricably intertwined" with a state court judgment. Furthermore, Old Republic's insured raised its arguments in the underlying state court lawsuit, and it was obviously not barred from pursuing those federal claims in the state arena. If, after pursuit of state remedies, Old Republic is dissatisfied with the judgments of the Alabama state courts, the proper route is appeal to the United States Supreme Court, not an attempted collateral attack or circumvention of the process. As well-documented by Old Republic, the review by the United States Supreme

Court of a large number of Alabama cases related to punitive damages, is evidence of the availability of that remedy.[5] There is no reason to believe, nor does Old Republic suggest, that this review would elude them or be deficient in any respect.

III.

In sum, Old Republic does not present a persuasive argument that this court should choose to hear this declaratory judgment action—if, indeed, it legitimately has jurisdiction—in a manner contrary to the established doctrines which discourage such interference with state courts. Even with the assumption that the proposed issues are proper subject matter, it declines, in its discretion, to exercise jurisdiction. An appropriate judgment will be entered.

DONE, this the 5th day of February, 1997.

UNITED STATES DISTRICT JUDGE

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[5] Old Republic refers the court to *Life Insurance Co. of Georgia v. Johnson*, ___ U.S. ___, 117 S. Ct. 288 (1996), *BMW v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996), *TXO Products Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711 (1993), and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991). In addition, Old Republic's brief in opposition to motion to dismiss cites Yale law professor George L. Priest, *The Punitive Damage Phenomenon in Alabama* (October 24, 1996), with permission, as completing a recent study which indicates that the United States Supreme Court reviews more punitive awards coming out of Alabama than any other state.

[Filed December 8, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 97-6179

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OLD REPUBLIC UNION INSURANCE COMPANY,

Plaintiff-Appellant,

versus

TILLIS TRUCKING CO., INC.; TILLIS LAND & TIMBER CO.; WILLIE RAY PRIDE; MALACHI MOSES,

Defendants-Appellees.

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On Appeal from the United States District Court
for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, COX, and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE